

10 years of federal habeas proceedings — to replace his court-appointed counsel. A jury convicted respondent Kenneth Clair of murder and sentenced him to death. “No forensic evidence linked Clair to the crime; instead, the main evidence against Clair came from his former girlfriend,” who stated at trial that on the night of the murder Clair said he “just finished beating up a woman,” had blood on his hand, and was carrying jewels. At the conclusion of direct review, Clair filed a federal habeas petition in 1994 and was appointed counsel under 18 U.S.C. §3599. The district court held an evidentiary hearing on Clair’s habeas petition in August 2004, and the parties filed post-hearing briefs in February 2005. In March 2005, Clair sent a letter to the court asserting that his attorneys from the Federal Public Defender (FPD) office “no longer . . . ha[d] [his] best interest at hand” and were not cooperating with a private investigator he had retained. He therefore asked for substitute counsel. The district court asked the parties to respond; the FPD’s response stated that Clair wants it to continue representing him. The court therefore took no action on the letter. Six weeks later, on June 16, 2005, Clair sent another letter to the court asking for new counsel. This letter asserted a “total break down of communication,” reiterated his prior complaints, and added that his private investigator had recently uncovered fingerprints and other physical evidence from the crime scene that had not been fully tested, yet his FPD lawyers were doing nothing to follow up on that discovery. The district court denied Clair’s renewed request for substitution two weeks later, without further inquiry. On the same day, the court denied Clair’s habeas petition in a detailed opinion. A few months later, Clair obtained new counsel. On appeal, the Ninth Circuit vacated the district court’s denial of both Clair’s request for substitute counsel and his habeas petition. The court did so on the ground that the district court abused its discretion by failing to inquire into the allegations in Clair’s second letter. In an opinion by Justice Kagan, the Court reversed.

The Court first addressed “the standard that district courts should use to adjudicate federal habeas petitioners’ motions to substitute counsel in capital cases.” Although §3599 grants capital inmates a right to counsel during their post-conviction proceedings, and contemplates that they might want to substitute counsel, it does not “specify how a court should decide such a motion.” The Court, agreeing with Clair, held that the proper standard is the “interests of justice” standard that applies in non-capital cases under 18 U.S.C. §3006A. The Court reasoned that this standard applied to capital cases prior to 1988, when Congress enacted what is now §3599 in order to grant *enhanced* rights to federal capital defendants and capital habeas petitioners. It therefore would make little sense to “conclude that Congress

silently prescribed a substitution standard” in §3599 that would be more stringent than §3006A’s standard. The Court also found a “dearth of support for the State’s alternative standard,” under which courts may replace counsel appointed under §3599 only when the lawyer lacks the qualifications required by §3599, has a “disabling conflict of interest,” or has “completely abandoned” the client. Finding that this proposed test “comes from . . . well, from nowhere,” the Court stated that it prefers working with “something familiar.” In addition, noted the Court, the state’s proposed standard “renders §3599’s substitution provision superfluous,” because even without that provision a district court would have to provide a capital defendant with new counsel in the three situations covered by the state’s test.

The Court next held that the district court did not abuse its discretion under the “interests of justice” standard when it denied Clair’s second request for new counsel. The Court stated that this would have been an easy case if Clair’s second letter “had merely recapitulated the charges in the first,” since the court had already conducted a proper inquiry after receiving the first letter. The second letter, however, charged that counsel had refused to investigate potentially important new evidence. “In the mine run of circumstances,” stated the Court, “Clair’s new charge would have required the court to make further inquiry before ruling on his motion for a new attorney.” The Court held that was not necessary here, however, because the district court “received Clair’s second letter while putting the finishing touches on its denial of his habeas petition” in the wake of “many years of litigation, an evidentiary hearing, and substantial post-hearing briefing.” In addition, any claims that might arise from the alleged new physical evidence would not relate to the claims in his habeas petition. To pursue them, substitute counsel would therefore have had to move to amend Clair’s petition, obtain an evidentiary hearing, and probably return to state court to exhaust his remedies. Given that the district court “could properly have rejected that motion, consistent with its order precluding further submissions, . . . the court also acted within its discretion in denying Clair’s request to substitute counsel, even without the usually appropriate inquiry.”

Maples v. Thomas, 10-63. By a 7-2 vote, the Court held that petitioner’s counsel abandoned him while his state post-conviction application was pending, which was “cause” to excuse the procedural default that occurred when he failed to appeal the denial of that application. Petitioner Cory Maples had been sentenced to death in 1997 in Alabama for murdering two people. Two young associates from the large New York firm Sullivan &

Cromwell agreed to work with Maples on his post-conviction petition on a *pro bono* basis. They associated with local counsel, who conditioned his participation on the agreement that he would not handle the substantive issues. The New York attorneys filed Maples' petition with the trial court, claiming ineffective assistance of trial counsel. While the motion was pending, the two New York attorneys left their firm and, in their new positions, could no longer represent Maples. They did not, however, notify Maples or the court. When the Alabama trial court denied Maples' post-conviction petition, the notices sent to his New York counsel were returned by the firm's mail room, unopened. Maples learned his petition had been denied from an Alabama Assistant Attorney General, who sent him a letter also informing Maples that he had four weeks to file a federal habeas claim. After other members of Sullivan & Cromwell were told of the misstep by Maples' mother, they filed a motion in the trial court asking the court to reissue its order so as to re-start the 42-day appeal deadline. The trial court denied the motion, finding that the new New York attorneys had not entered an appearance. The Alabama Court of Criminal Appeals declined Maples' petition for a writ of mandamus, finding no fault with the court's clerk, who had sent the notice denying Maples' appeal to all three attorneys of record. Maples filed a federal habeas petition, which the district court denied because he had procedurally defaulted his claims in state court. The Eleventh Circuit affirmed. Both courts cited *Coleman v. Thompson*, 501 U.S. 722 (1991), which held that "when a petitioner's postconviction attorney misses a filing deadline, the petitioner is bound by the oversight and cannot rely on it to establish cause." In an opinion by Justice Ginsburg, the Court reversed.

After expressing disapproval of Alabama's method of appointing and paying counsel to represent indigent capital defendants at trial and on post-conviction review, the Court turned to the facts of this case and to how *Coleman v. Thompson* applies to them. The Court explained that, as it held in *Coleman*, negligence by a prisoner's post-conviction attorney is not "cause" that can excuse a procedural default because the principal (the prisoner) bears the risk of his agent's (the attorney's) negligence. But "[a] markedly different situation is presented . . . when an attorney abandons his client without notice, and thereby occasions the default. Having severed the principal-agent relationship, an attorney no longer acts, or fails to act, as the client's representative." A default caused by an attorney's abandonment of his client, therefore,

constitutes an event external to the prisoner that can qualify as cause. And, held the Court, that is what happened here.

The Court rejected the state's contention that Sullivan & Cromwell continued to represent Maples even after the two associates who had been handling the case left the firm. The Court noted that the two associates did not seek the Alabama trial court's permission to withdraw, and that they remained the listed counsel of record. As a consequence, none of the members of Sullivan & Cromwell who later tried to act on Maples' behalf had legal authority to do so when his time for appeal expired. Thus, "[a]t the time critical to preserving Maples' access to an appeal, they, like [the two associates], were not Maples' authorized agents." The Court also found that Maples' local counsel "also left him abandoned" and "[t]hat the minimal participation he undertook was inconsistent with Alabama law . . . underscores the absurdity of holding Maples barred because [the attorney] signed on as local counsel." In the end, held the Court, "[t]hrough no fault of his own, Maples lacked the assistance of any authorized attorney during the 42 days Alabama allows for noticing an appeal from a trial court's denial of postconviction relief . . . He has shown ample cause . . . to excuse the procedural default into which he was trapped when counsel of record abandoned him without a word of warning."

Justice Alito filed a concurring opinion, noting that the "unique circumstances" in this case were a "veritable perfect storm of misfortune" that resulted in abandonment by his attorneys that caused the procedural default. He disagreed, however, with the majority's criticism of Alabama's system of providing counsel, which he found irrelevant to the case. Justice Scalia filed a dissenting opinion, which Justice Thomas joined. Justice Scalia would have held that Maples, like all habeas petitioners, should be responsible for all of his attorney's errors, particularly on these facts, where: (1) Maples had no right to counsel in post-conviction proceedings; (2) Maples was represented by the New York firm, rather than the individual attorneys, and there was no indication that *the firm* no longer represented him; and (3) even non-substantive involvement by local counsel would involve keeping track of court orders and deadlines, and local counsel's failure to act must be imputed to Maples. The dissent expressed the concern that habeas petitioners will now routinely seek to overcome the procedural bar by arguing "that counsel's ineffectiveness demonstrates that he was not a genuinely representative agent."